MARATHAEI SANGULULLAI & ANOR

v.

SYARIKAT JG CONTAINERS (M) SDN BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
PAJAN SINGH GILL JCA
RAHMAH HUSSAIN JCA
[CIVIL APPEAL NO: W-02-554-1998]
18 FEBRUARY 2003

LABOUR LAW: *Industrial Court - Right to representation - Right to legal or trade union representation for workman - Whether only available in s. 20(3) proceedings - Whether available in non-compliance proceedings under s. 56 - Procedural fairness - Equality before the law - Industrial Relations Act 1967, ss. 20(3), 27(1), 56 - Federal Constitution, art. 8(1)*

CONSTITUTIONAL LAW: *Fundamental liberties - Right to counsel - Right to legal or trade union representation for workman in non-compliance proceedings before Industrial Court - Procedural fairness - Rule of law - Equality before the law - Industrial Relations Act 1967, ss. 20(3), 27(1), 56 - Federal Constitution, art. 8(1)*

CONSTITUTIONAL LAW: *Legislation - Presumption of constitutionality - Rule of law - Procedural fairness - Equality before the law - Parliamentary silence - Parliamentary sovereignty - Written and unwritten constitution - Right to legal or trade union representation for workman in non-compliance proceedings before Industrial Court*

STATUTORY INTERPRETATION: *Construction of statutes - Presumption of constitutionality - Rule of law - Procedural fairness - Equality before the law - Parliamentary silence - Parliamentary sovereignty - Written and unwritten constitution - Right to legal or trade union representation for workman in non-compliance proceedings before Industrial Court*

ADMINISTRATIVE LAW: *Remedies - Certiorari and mandamus - Application to quash award of Industrial Court denying workman right to legal or trade union representation in non-compliance proceedings - Whether right only available in s. 20(3) proceedings - Whether available in non-compliance proceedings under s. 56 - Procedural fairness - Rule of law and equality before the law - Industrial Relations Act 1967, ss. 20(3), 27(1), 56 - Federal Constitution, art. 8(1)*

This was an appeal by the legal representatives of the deceased claimant against the decision of the High Court dismissing their application for *certiorari* to quash the award of the Industrial Court denying the deceased claimant legal and/or trade union representation at the hearing of a non-compliance proceeding brought by the deceased claimant against his employer ('the respondent'). The issue that fell for determination turned on the interpretation of s. 27(1) of the Industrial Relations Act 1967 ('the IRA'), namely, whether s. 27(1)(d) of the IRA precludes a workman from having legal and/or trade union representation in non-compliance proceedings under s. 56 of the IRA.

Held:
Per Gopal Sri Ram JCA

[1] The opening words of s. 27(1) of the IRA are very wide and clear. The words "In any proceedings before the court" must mean any proceedings under the IRA, including non-compliance proceedings under s. 56 thereof. Furthermore, the reference in para (d) of s. 27(1) of the IRA to "proceedings under s. 20(3)" does not diminish the amplitude of the said words. There is nothing in either s. 27 or 56 of the IRA that expressly or impliedly denies a workman the right to representation in non-compliance proceedings; the sections are merely silent and do not, therefore, remove or curtail the common law right of a litigant to representation by counsel of his choice. (pp 101 c-f & 104 e)

[2] Although the IRA is silent on the issue of representation by counsel for a workman in non-compliance proceedings, parliamentary silence on a point of such importance as representation by counsel enables the court to read such a right into the IRA. The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before tribunals. Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law, both on substantive and procedural fairness. (pp 101 h, 102 b-e, 103 c-e & 104 a, e)

[3] It is axiomatic that the Industrial Court, as an adjudicatory tribunal, must accord procedural fairness to those who appear before it. In the present case, it permitted the respondent to be represented, and yet it insisted on the deceased claimant being unrepresented. This denial of the right to representation was at variance with the very fundamental principles of procedural fairness. (pp 104 f-g)

[Appeal allowed; order of High Court set aside; order in terms of appellants' motion before High Court; matter remitted to Industrial Court for hearing on the merits.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh wakil di sisi undang-undang simati penuntut terhadap keputusan Mahkamah Tinggi kerana menolak permohonan mereka untuk *certiorari* bagi membatalkan award Mahkamah Perusahaan yang enggan membenarkan simati penuntut diwakili oleh kesatuan sekerja pada pendengaran prosiding ketidak-patuhan yang dibawa oleh simati penuntut terhadap majikannya ('responden'). Isu yang berbangkit adalah bersangkutan pentafsiran s. 27(1) Akta Perhubungan Perusahaan 1967 ('APP'), yakni samada s. 27(1)(d) APP menghalang seseorang pekerja untuk mendapatkan representasi perundangan dan/ atau kesatuan sekerja dalam prosiding ketidak-patuhan di bawah s. 56 APP.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Perkataan-perkataan pembuka s. 27(1) APP adalah jelas dan sangat luas. Prasa "in any proceedings before the court" mestilah bermaksud mana-mana prosiding dibawah APP, termasuk prosiding ketidak-patuhan di bawah s. 56 tersebut. Lagipun, rujukan kepada "proceedings under s. 20(3)" di perenggan (d) s. 27(1) APP tidaklah mengurangkan ruang-litup perkataan-perkataan tersebut. Tiada apa-apa pun sama ada di dalam s. 27 atau 56 APP yang secara langsung atau tidak langsung menghalang seseorang pekerja dari mendapat representasi dalam prosiding ketidak-patuhan; seksyen-seksyen berkenaan hanya senyap dan dengan itu tidak menyingkir atau menghadkan hak-hak common law seseorang litigan kepada representasi oleh peguam pilihannya.

[2] Walaupun APP tidak berkata apa-apa berhubung isu representasi oleh peguam untuk pekerja dalam prosiding ketidak-patuhan, kesenyapan parlimen dalam hal yang sebegitu penting seperti representasi oleh peguam membolehkan mahkamah membaca hak sedemikian ke dalam APP. Pertimbangan-pertimbangan yang memerlukan bantuan guaman di dalam mahkamah biasa terlaksana sama dalam prosiding di hadapan tribunal. Kecuali terdapat peruntukan sebaliknya yang sangat jelas, Parlimen hendaklah dianggap tidak menggubal sesuatu yang bertentangan dengan rule of law, sama ada berhubung keadilan substantif atau prosedur.

[3] Adalah jelas bahawa Mahkamah Perusahaan, sebagai sebuah tribunal adjudikatori, berkewajipan memberikan keadilan prosedur kepada mereka-mereka yang datang kepadanya. Dalam kes semasa, ia membenarkan

responden untuk diwakili, tetapi menuntut supaya simati penuntut tidak diwakili. Penolakan hak kepada representasi ini melanggar prinsip-prinsip terpenting keadilan prosedur.

[Rayuan dibenarkan; perintah Mahkamah Tinggi diketepikan; perintah sekadarnya bagi usul perayu di Mahkamah Tinggi; halperkara dikembalikan ke Mahkamah Perusahaan untuk pendengaran berdasarkan merit.]

Case(s) referred to:
Cooper v. Wandsworth Board of Works [1863] 143 ER 414 ***(refd)***
Doresamy v. Public Services Commission [1971] 2 MLJ 127 ***(foll)***
Malloch v. Aberdeen Corporation [1971] 2 All ER 1278 ***(refd)***
McCawley v. R [1920] AC 691 ***(refd)***
Pierson v. Secretary of State for the Home Department [1997] 3 All ER 577 ***(foll)***
Pesurohjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors [1971] 2 MLJ 30 ***(refd)***
R v. Secretary of State for the Home Department, ex p Simms [1999] 3 All ER 400 ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 2 MLJ 116 ***(refd)***
Rohana Ariffin & Anor v. Universiti Sains Malaysia [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 ***(refd)***
'The Boucraa' [1994] 1 All ER 20 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(3), 27(1)(d), 56
Rules of the High Court 1980, O. 53

For the appellants - Sivarasa Rasiah (M Mogannambal & Lateefa Koya); M/s Daim & Gamany
For the respondents - S Ravichandran; M/s Gomez & Assoc

[Appeal from High Court; Kuala Lumpur, Originating Motion No: R1-25-111-93]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:
This appeal raises a short but important point of public law. The facts relevant to the point lie in a narrow compass.

As long ago as 22 July 1989, the Industrial Court made an award in favour of one Thangayah Aupulley, now deceased, who had been in the employment of the respondent herein. We will refer to him as "the workman". The award was for a very small sum: RM15,592.10. The respondent paid RM10,000. It did not pay the balance. The reason it gave was that the workman had agreed to waive the balance. The workman was unhappy. So, the workman moved the Industrial Court under s. 56 of the Industrial Relations Act 1967 ("the Act")

by way of a complaint of non-compliance. The workman was represented by an officer from the Malaysian Trade Union Congress ("MTUC"). The respondent was represented by an officer of the Malaysian Employers Federation ("MEF"). At the outset the MEF officer objected to the workman being represented by the MTUC representative. The president of the court upheld the objection and held that the workman should represent himself. On a subsequent date of hearing, Mr. Sivarasa Rasiah, an advocate and solicitor, and counsel for the appellants in this appeal, appeared for the workman before the same president. Again an objection was taken and upheld. As a result the appellant was required to represent himself whilst the respondent had the advantage of representation. The workman then died and his legal representatives moved the High Court for certiorari to quash the award of the Industrial Court denying the workman representation and for a consequential order of mandamus. The High Court dismissed the application and the present appeal is directed against that order.

At the heart of this appeal lies the interpretation to be given to s. 27(1)(d) of the Act. For completeness we reproduce the whole of s. 27(1) below:

> 27(1) In any proceedings before the Court a party may:
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> (a) where the party is a trade union, be represented by an officer or employee of the trade union;
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> (b) where the party is an employer, appear himself personally or be represented by his duly authorized employee, or by an officer or employee of a trade union of employers of which he is a member;
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> (c) where the party is a workman (in proceedings under section 20 (3)), appear himself personally or where he is a member of the trade union of workmen, be represented by an officer or employee of the trade union;
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> (d) where the party is a trade union, or an employer, or a workman (in proceedings under section 20 (3)), be represented with the permission of the President or the Chairman, by an advocate, or, notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, by any official of an organisation (not being a trade union) of employers or of workmen, as the case may be, registered in Malaysia.

The Industrial Court held that the workman was not entitled to have legal or other representation at a non-compliance hearing and that finding was upheld by the High Court in proceedings for *certiorari* under the former O. 53 of the Rules of the High Court 1980. The present appeal is directed against the refusal of prerogative relief by the High Court.

The central question in this appeal is whether s. 27(1)(d) precludes a workman who has obtained an award in his favour pursuant to a reference under s. 20 from having legal or MTUC representation in a non-compliance hearing under s. 56 of the Act. If the answer to that question is in the affirmative, then both the Industrial Court and the High Court were correct in their respective decisions and this appeal must fail. On the other hand, if the answer is in the negative, then, of course, the Industrial Court was plainly wrong in the sense that its decision is flawed by an error of law.

In our judgment it is the latter answer that is the correct response to the question posed. There are two reasons for this. First, the construction of s. 27(1) itself. The opening words of the section are very clear. And they are very wide indeed. They read: "In any proceedings before the court". These words must be taken to mean what they say. "Any proceedings" must mean "any proceedings under the Act". So, they must include non-compliance proceedings under s. 56 of the Act.

The next stage of the inquiry is to determine if there is any thing in para. (d) of s. 27(1) that whittles down or cuts back on the width of the opening words of the section. We do not think that it does. In our judgment, para. (d) merely identifies proceedings under s. 20(3) of the Act as one of those cases in which there may be representation with leave. Section 20(3) relates, of course, to a complaint by an individual workman that he was dismissed without just cause or excuse.

There is nothing in s. 27 or s. 56 that expressly or by necessary implication denies a workman the right to representation in non-compliance proceedings. It is merely silent. It does not remove or curtail the common law right of a litigant to representation by counsel of his choice: provided, of course that such counsel is ready, willing and able to act.

In *Doresamy v. Public Services Commission* [1971] 2 MLJ 127, Raja Azlan Shah J (as he then was) recognised the existence of the common law right of representation. His lordship said:

> Now this question must be posed: if he has a statutory right of appeal why cannot his solicitor appeal on his behalf? The regulation is silent on the right to the assistance of counsel. Is that adequate to deprive the aggrieved person of the right to the assistance of counsel? I think not. **The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before disciplinary tribunals. This is especially so when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful, every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review**

> **stage.** Where he has a statutory right of appeal and the regulations are silent on the right to the assistance of counsel, he cannot be deprived of such right of assistance. I can find nothing from regulation 13(1) to limit his right. (emphasis added.)

Like the regulations in *Doresamy's case* (supra), the Act is silent on the issue of representation by counsel for a workman in non-compliance proceedings. And, as in Doresamy's case, parliamentary silence on a point of such importance as representation by counsel enables the court to read such a right into the Act. It is just like the rules of natural justice being read into a statute in the absence of any express or implied provision going the other way. See *Malloch v. Aberdeen Corporation* [1971] 2 All ER 1278. The principle of reading the requirement of procedural fairness into a statute may be traced to the following dictum of Byles J in *Cooper v. Wandsworth Board of Works* [1863] 143 ER 414 at 420:

> Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission.

It is now well settled that at common law, both procedural and substantive fairness may be read into a statute on the basis that parliament is presumed to have legislated in accordance with the rule of law. This point was brought home in clear terms by Lord Steyn in *Pierson v. Secretary of State for the Home Department* [1997] 3 All ER 577, 606:

> But counsel addressed the wrong target. The correct analysis of this case is in terms of the rule of law. The rule of law in its wider sense has procedural and substantive effect. While Dicey's description of the rule of law (Introduction to the Study of the Law of the Constitution (10th edn, 1968) p. 203) is nowadays regarded as neither exhaustive nor entirely accurate even for his own time, there is much of enduring value in the work of this great lawyer. Dicey's famous third meaning of the rule of law is apposite. He said:
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> > The "rule of law", lastly, may be used as a formula for expressing the fact that with us the law of constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land.
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> This was the pivot of Dicey's discussion of rights to personal freedom, and to freedom of association and of public meeting (see pp. 206-283). It is clear therefore that in the relevant sense Dicey regarded the rule of law as having both procedural and substantive effect. In a valuable essay Professor Jeffrey

> Jowell has re-examined Dicey's theme: see 'The Rule of Law Today' in The Changing Constitution by Jowell and Oliver (3rd edn, 1994) pp 74-77. Relying on striking modern illustrations, Professor Jowell concluded that the rule of law has substantive content: see *Hall & Co Ltd v. Shoreham-by-Sea UDC* [1964] 1 All ER 1, [1964] 1 WLR 1240, *Congreve v. Home Office* [1976] 1 All ER 697, [1976] QB 629 and *Wheeler v. Leicester City Council* [1985] 2 All ER 1106, [1985] AC 1054 per Lord Templeman, with whom Lord Bridge of Harwich, Lord Brightman and Lord Griffiths agreed. Wade Administrative Law (7th edn, 1994) pp. 24ff and de Smith and Brazier Constitutional and Administrative Law (7th edn, 1994) p. 18, are to the same effect. *Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural. I therefore approach the problem in the present case on this basis.* (emphasis added.)

Lord Steyn was, of course, speaking about the power of a Parliament under what Lord Birkenhead in *McCawley v. R* [1920] AC 691 termed an "uncontrolled constitution". But we do not have an "uncontrolled constitution". We have what Lord Birkenhead termed in the same case, as "a controlled constitution". In other words, our Parliament, unlike the parliament of the United Kingdom, has no power to enact a law that is ultra vires the Federal Constitution. This is the fundamental difference between our Federal Constitution and the British Constitution. Failure to keep this most elementary difference in the forefront of our minds will lead to serious and most basic constitutional errors.

The fundamental difference in the constitutional fabric of jurisdictions having a written constitution, such as Malaysia, and the United Kingdom comes across in the speech of Lord Hoffmann in *R v. Secretary of State for the Home Department, ex parte Simms* [1999] 3 All ER 400 at p. 412:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. *In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.* (emphasis added.)

Dicey's doctrine of the Rule of Law has influenced many Commonwealth Constitutions. It has been expressly incorporated into almost all of them. Malaysia is no exception. The doctrine of the Rule of Law is housed in the equality provision in art. 8(1) of our constitution. Hence, translating Lord Steyn's dictum in *Pierson v. Secretary of State for the Home Department* (*supra*) into Malaysian terms, it is unconstitutional for our Parliament to enact a law or authorise the enactment of any subsidiary written law that conflicts with art. 8(1).

Hence, the primary approach of a court to all written law is to act upon the presumption that parliament does not intend an unfair or unjust result, that is to say, that it accords with the Rule of Law in art. 8(1). This is a presumption of ancient repute that finds its origins in the context of retrospective legislation. But it is of wider amplitude and of general application. Raja Azlan Shah J (as he then was) referred to it in *Pesurohjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors* [1971] 2 MLJ 30 at p 31. Lord Mustill reaffirmed it in *'The Boucraa'* [1994] 1 All ER 20 at pp 29–30. It is a strong presumption. But it is rebuttable. And only when it is rebutted does the constitutionality of the particular written law become an issue. This is merely another way of saying, in the context of the constitutional validity of a statute, that there is a strong presumption in favour of constitutionality. See, *PP v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116.

Applying the presumption of legislative fairness to the present case, we find no intention whatsoever on the part of parliament to exclude the right of an individual workman to representation at the hearing of a non-compliance complaint.

That brings us to the second reason for holding in the appellant's favour. It is axiomatic that the Industrial Court as an adjudicatory tribunal must accord procedural fairness to those who appear before it. In the present case, it permitted the respondent to be represented by someone from the MEF. Yet it insisted on the workman being unrepresented. One need hardly do more than state what happened to realise the unfairness of the procedure adopted. The decision of the Industrial Court denying the appellant the right to representation goes against the fundamental principles of procedural fairness as enunciated by Edgar Joseph Jr. J (as he then was) in his ground breaking judgment in *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390.

Mr. Ravichandran of counsel for the respondent, accepted the unfairness of the procedure accorded to the appellant in consequence of the ruling of the Industrial Court. He therefore did not seek to support the awards denying representation. His conduct of this appeal is entirely in keeping with the highest standards of the Bar. We commend him.

Learned counsel for the appellant invited us to intervene and direct compliance. However, having given the matter a little more thought, he agreed with us that this is not an appropriate case for such intervention because there are issues of fact that require determination, particularly in respect of the defence taken by the respondent to the complaint of non-compliance. We therefore need say no more about this.

For the reasons given, the appeal was allowed. The order to the High Court was set aside. We also ordered that there be an order in terms of the appellants' motion before the High Court. The respondent was directed to pay to the appellants the costs at all levels. Because it was the respondent's stubborn stand before the Industrial Court that the appellant be denied representation at the non-compliance hearing that has occasioned so much delay in this matter and the need for the appellant to seek judicial review. We therefore directed that costs be taxed on a solicitor and client indemnity basis and be paid by the respondent to the appellant. The deposit in court was ordered to be paid out to the appellant. Lastly, the matter was remitted to the Industrial Court for hearing on merits.